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PRICE MAINTENANCE IN THE BOOK TRADE

SUMMARY

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I. INTRODUCTORY

THE question of price maintenance has recently commanded more than ordinary attention because of the hearings and discussion in connection with the anti-trust legislation of the last Congress. Altho the Stevens Bill,¹ providing for the maintenance of fixed prices upon trade-marked products at the option of the manufacturer, failed to be enacted into law, the regulations with regard to local price cutting incorporated into the Clayton Act have more than a nominal connection with it. On the other hand, the Supreme Court of the United

¹ The bill proposed absolute uniformity of prices legally enforced, for each group of buyers, wholesalers, retailers, and consumers, with full publicity. One section of the bill was designed to prohibit monopolies or combinations in restraint of trade from availing themselves of its provisions. H. R. 13,305, 63rd Congress, 2nd Session.

States in a recent case has declared that a combination formed for the purpose of maintaining prices is contrary to the Sherman Act, therefore, presumably contrary to public policy, — virtually a declaration that price maintenance effected by a combination is detrimental.¹ Whether one adopts this attitude or not, it is interesting to observe and compare the efforts made in this and other countries to bring about the maintenance of fixed prices.

In no line of business activity have the advocates of the principle been more aggressive or achieved greater results than in the publication and distribution of printed books. There is scarcely a European country of importance in which booksellers and publishers have not endeavored through combination to maintain fixed and uniform prices.² In Germany, the Börsenverein and a complex distributing organization are utilized for the purpose. In France, the "syndicat" of publishers coöperates with the "syndicat" of booksellers. Belgium has her Cercle Belge de la Librairie; Holland, Switzerland, and the Scandinavian countries all possess their associations for the maintenance of book prices. In Great Britain the Publishers' Association and the Associated Booksellers, formed for the express purpose of maintaining prices, furnished the model for the American Publishers' Association and the organization of booksellers. The combinations in the three leading countries, England, Germany, and the United States are typical, and have been selected for closer study.

Published books are distributed in England and America in essentially the same manner as other mer-

¹ 34 Sup. Ct. Rep. 84 (December, 1913). *Printers' Ink*, May 7, 1914.

² Information concerning the regulations of the various organizations may be found in the English trade periodical, the *Publishers' Circular and Booksellers' Guide*, vol. lxxxv, p. 309, and in the American journal, the *Publishers' Weekly*, vol. lxxviii, pp. 1574 et seq. (hereafter abbreviated *Pub. Cir. and Pub. Wk.*). For Belgium, see also de Leener, *Syndicats Industriels en Belgique*, vol. i, pp. 393-395.

chandise. The publisher, as the manufacturer, disposes of his product to the wholesale book dealer, who in turn sells the books to the retailer; tho in some cases the publisher has chosen to pass over the wholesaler and deal directly with the retailer, or even with the consumer. But in Germany, the book trade possesses a complex distributive organization of its own, necessitated by the extreme decentralization which characterizes the marketing of books.¹ Under the present system, the retail dealer sends his orders at certain intervals to the special order office (Bestellamt) which has been established at Leipzig by the book trade association of that city for the convenience of the German book trade. There the order slips are sorted and sent either direct to the publishers, to the Barsortimenter,² or to the Kommissionären,³ as designated upon the slips. The Barsortimenter is the exact parallel to the wholesale book dealer of England and America, — one who buys books outright from the publisher and keeps them in stock in anticipation of future demands of the retail trade. The Kommissionär is peculiar to the German book trade, being for all practical purposes a publishers' agent who for the purpose of facilitating delivery will usually carry in stock at a central point supplies of the books issued by the publishers whom he represents. Without one feature, the Kommissionär would be little more than a warehouse firm — namely the widespread

¹ Upon the history and organization of the German book trade, may be consulted, among other works, Fischer, *Organisation des deutschen Buchhandels* (1903); Kapp, *Geschichte des deutschen Buchhandels*, and Goldfriedrich's work of the same title, bring the history in very complete form down to 1889. Präger's *Geschichte des deutschen Buchhandels*, is a popularly written account. Karl Bücher, *Buchhandel und Wissenschaft*, will be taken up at greater length below. Jordan, *Der Zentralization- und Konzentrations-prozess im Kommissionsbuchhandel*, shows very clearly the growing concentration in this branch of the trade. Cf. also *Handbuch der Wirtschaftskunde Deutschlands*, vol. iv, pp. 97-139. Much material is also to be found in the *Kontradiktorische Verhandlungen* to be mentioned later.

² Fischer, pp. 77 et seq.

³ Pohle, in *Schriften des Vereins für Sozialpolitik*, vol. lx. Also Bücher, pp. 20-31.

use of the so-called *a condition* system, whereby the manufacturer sends books of his own publication to the retailer through the Kommissionär, on condition that the retailer return the books, carriage prepaid, if not sold by the following Easter fair (Ostermesse), or hold them at the disposal of the publisher. This system increases the utility and importance of the commission book merchants. The Kommissionär keeps the accounts of the publishers whom he represents; as is the custom in the trade, settlements are made annually at the Easter fair held at Leipsic. The retailer is thus not compelled to buy books the sale of which is very doubtful. Less capital is required in the retail trade; and the *a condition* system accounts in part for the decentralization which obtains. If the Kommissionär or Barsortimenter has no copies of the desired books in stock, the orders are forwarded to the publisher, who fills and ships them, usually *via* Leipsic or one of the less important centers, Berlin and Stuttgart.

In Germany, as well as in the United States and England, the publisher has the right to fix the so-called publishers' price — the stated retail price, not to be exceeded in actual retail sales, and expected to be maintained in them. The statement of this right is incorporated in German law, with the proviso that an advance in price shall require the consent of the author. Though there is no specific statute in the other countries the general practice is the same. The publisher is a monopolist as regards any book he issues. He fixes prices with the design to yield the greatest net return, having regard to the character of the book, the extent and elasticity of demand, and the availability of substitutes.

The publishers' price in the three countries to be considered, forms the base price from which, by an arrangement of discounts, the prices paid by wholesale

and retail dealers are computed. The retailers' discount varies from 20 to 50 per cent, the normal being about 25 per cent. In each of the three countries, moreover, competition between book dealers led to the introduction of a discount given to retail customers, which lowered the price to the buyer and the profit to the retailer. The customers' discount became common and was gradually increased in amount until the profitability and hence the existence of the bookseller seemed to be threatened.

II. THE GERMAN BOOK TRADE

The first efforts, of 1802, to regulate by association the customers' discount in the German book trade had been preceded by several attempts to unite for other purposes, — chiefly in order to devise some means of doing away with the cumbersome method of making annual settlements at the Leipsic fair, and also to wage common warfare against piracy.¹ The outcome of this and later agitation was the organization in 1825 of the *Börsenverein der deutschen Buchhändler*, the main purpose of which was to constitute a sort of clearing house for the settlement of accounts.² The endeavor to remedy the discount evil in 1802 demonstrated the necessity of a centralized organization; while the later movements of 1832 and 1847–48 showed clearly that a decentralized organization was just as important.³ The *Börsenverein* furnished the centralized organization, tho at this time

¹ For these early attempts, especially those of 1765 and 1798, see Goldfriedrich, vol. iii, pp. 223 et seq. They are also mentioned in vol. ii, p. 239, of the hearings in the official investigation of 1903–1905, known as the *Kontradiktorische Verhandlungen über deutsche Kartelle* (*Verhandlungen über den Börsenverein der deutschen Buchhändler am 11, 12, und 13 April, 1904, im Reichsamt des Innern und im Reichstagsgebäude zu Berlin, Stenographische Berichte*). Cf. also Präger, vol. ii, pp. 151–152.

² Fischer, pp. 36, 203; Goldfriedrich, vol. iv, pp. 133–165.

³ Pohle, in *Schriften des Vereins für Sozialpolitik*, vol. lx, pp. 480–491, 500; Bücher, p. 70; Präger, vol. ii, p. 85; Goldfriedrich, vol. iv, pp. 338–368.

it declined to aid either in the maintenance of prices or in the regulation of discounts.

For thirty years nothing was done in this direction. But the movement in favor of price maintenance received new stimuli in the decade of the seventies. The introduction in 1873 of the uniform 5 kg. parcels post promoted further competition and led to an increase in discounts granted to consumers, especially by the dealers located in Leipsic and Berlin, to which low freights attracted customers from a wider field.¹ At the same time, the discount given to retail dealers was gradually decreased in amount until 25 per cent became the normal, instead of the former $33\frac{1}{3}$ per cent.² The book-sellers' profit was not only sliced off at both ends, but the increased number of dealers also further diminished the profit of each. The depressed condition of the German book trade in the seventies became an acknowledged fact, and still further decline was predicted.³ Finally, in 1878, at the instance of certain book dealers, the management of the Börsenverein called a meeting at Weimar.⁴ The Börsenverein was not yet ready to coöperate in support of the publishers' price but it urged the formation of local book trade associations. In the following year, the existing local and district associations combined to form the Verband der Orts-und Kreisvereine. The local groups were unable without assistance to deal satisfactorily with the discount question. The book retailers appealed to the publishers in 1882, but out of the twelve hundred publishers less than half were willing to treat a larger discount than 10 per cent as excessive.⁵ Nevertheless continued agitation

¹ Bücher, p. 70; Pohle, p. 504.

² Fischer, p. 184; Kontradiktorische Verhandlungen, p. 585; Handwörterbuch der Staatswissenschaften, dritte Auflage, vol. ii, p. 274.

³ Kontradiktorische Verhandlungen, pp. 415, 591.

⁴ Bücher, pp. 70-71; Pohle, pp. 500-502; Goldfriedrich, vol. iv, pp. 513 et seq.

⁵ Pohle, p. 502; Handwörterbuch der Staatswissenschaften, vol. ii, p. 274.

had its effect. With active leadership and aroused sentiment, the Börsenverein at an extraordinary session in Frankfurt in September, 1887, decided to assist in fixing uniform and fair terms of sale, and to aid in the maintenance of the publishers' price.¹ The rules and regulations adopted at that time were very similar to those in force today.²

There are at present, consequently, two types of organization which coöperate to regulate the customers' discount and maintain the publishers' price. The first is the centralized organization, the Börsenverein der deutschen Buchhändler, whose history has just been sketched. It has a membership of publishers, and of wholesale, retail and commission book dealers, numbering 3,563 in September, 1913.³ The purpose of this organization is primarily to subserve the general interests of the book trade by establishing agencies for facilitating the various operations in the distribution of printed books; but it has now also included among its objects, as mentioned above, coöperation with the retailers to maintain the publishers' price and to regulate discounts. Any person or firm actively engaged in the book business may join, provided he is a member of an approved local or district book trade association and signs a written contract to observe all rules which are at that time in force, or are subsequently ordered by the proper authorities.⁴ The activities of the Börsenverein

¹ Fischer, p. 191; Pohle, p. 504; Goldfriedrich, vol. iv, pp. 562 et seq.

² Information as to the regulation at various times may be found in Pohle, pp. 504, 505; Fischer, p. 192; Handwörterbuch, vol. ii, p. 274; Addressbuch des deutschen Buchhandels, 1914, Abteilung IV, p. 30.

³ Upon the Börsenverein, see Addressbuch, Abteilung IV, p. 30; Kontradiktorische Verhandlungen, pp. 581 et seq.; Fischer, pp. 205 et seq.

⁴ The four administrative organs of the Börsenverein are (a) the general meeting of members (Hauptversammlung), (b) the managing board (Vorstand) in active charge of the business, (c) special committees in charge of the specific activities of the organization, (d) the local and district associations, the publishers' association, and the association of Kommissionären.

include, among others, the maintenance of a clearing house for the settlement of accounts; a department for the historical investigation of the book trade; the publication of the *Börsenblatt*, the official organ of the Verein and the indispensable trade journal; and the maintenance of friendly relations with, and the encouragement and approval under certain conditions of, local and district associations.

The second type, that of the decentralized local and district associations, is very necessary in order to secure the success of any plan to maintain prices.¹ In these, of course, retail dealers predominate. These local and district associations are again federated in the *Verband der Orts-und Kreisvereine*. There are still other combinations devoted to special branches of the trade, but the majority are not of interest in connection with price maintenance.² The German Publishers' Association, formed in 1886 to further general interests of the business, requires its members to join the *Börsenverein*, consequently shifting the matter of price maintenance to that organization.³ The present combination of publishers is a general organization with a membership of about seven hundred, the activities of which are directed chiefly toward the elimination of certain credit abuses.

The regulations of the *Börsenverein* concerning the sale of books at retail, which must be observed by every bookseller, are substantially as follows:⁴ in the sale of new books to the public (*i. e.*, to those purchasing for

¹ For list see *Addressbuch*, 1914, pp. 35-40, 45 et seq.; cf. also *Kontradiktorische Verhandlungen*, p. 586.

² For other special associations, see Fischer, p. 224; *Addressbuch*, Abteilung IV, pp. 42 et seq.

³ Fischer, pp. 221-223; *Addressbuch*, p. 39.

⁴ *Handwörterbuch der Staatswissenschaften*, vol. ii, pp. 274-275; *Pub. Wk.*, vol. lxxviii, p. 381; *Kontradiktorische Verhandlungen*, pp. 582-585.

personal use), the publishers' price must be strictly observed; discounts are forbidden except to certain libraries (formerly 10, now $7\frac{1}{2}$ and 5 per cent). Certain local exceptions, still existing, are gradually being abolished. Local associations may control by agreement the prices of books not fixed by the publisher. Violation of the rules of the Börsenverein or of the rules of an approved local association, is penalized very severely by exclusion from the Verein and a general boycott. The name of the offender is published; and all booksellers are bound not to deliver the books of any publisher against his will to such dealers as have been barred from the Börsenverein and the use of its agencies either by general vote of the organization or by the managing board. In effect, it means that if the dealer does not observe the rules, he can continue in business only with great difficulty. For he must pay full retail prices for his books, and he is refused the use of the vital parts of the book distributing system, the central order office, the services of the Kommissionären, and the Börsenblatt. The hearty coöperation of the various associations results in a most effective enforcement of the no-discount rules.

Considerable controversy has taken place as to whether the Börsenverein is a kartell or not, the test being direct control of price. The weight of German authority seems to incline toward the negative, asserting that the local and district associations are the real kartells, while the Börsenverein merely furnishes the means for enforcement.¹

As might be expected, price maintenance and the abolition of discounts has met with opposition from several quarters. Individual book buyers, librarians,

¹ Kontradiktorische Verhandlungen, pp. 243, 244, 583; also R. Liefmann, in Conrad's Jahrbücher, vol. lxxxiii (1904), "Der deutsche Buchhandel in der Kartellenquete nebst Untersuchungen über seine voraussichtliche Weiterbildung."

and authors strongly opposed the movement. The outcome was the formation of the Akademische Schutzverein,¹ a protective association with branches in a number of university cities. As members were enrolled many men prominent in the academic world as well as the representatives of many important libraries. The Leipsic branch of the Schutzverein attempted to force the restoration of the customers' discount, and members proceeded to boycott all dealers who refused to concede, at the same time concentrating all purchases upon one firm. But the Börsenverein and its affiliated organizations immediately boycotted this firm and soon put a stop to this practice, as well as to the scheme for establishing a sort of coöperative book store.² At about this time (1903-04), Dr. Karl Bücher, one of the members of the Schutzverein, published a book entitled *Wissenschaft und Buchhandel* which on the whole represents the attitude of the protective association — a very severe criticism of the book trade and of the efficiency of the much-lauded organization. Dr. Bücher asserts that book prices have advanced, a fact which was generally admitted. With others, he detected therein an obstacle to the progress of German education.³ Depression in the book trade, upon which the justification for abolishing the discount is based, is admitted, but this depression is ascribed not so much to abuses of the discount system as to the fact that the large profits of the trade had stimulated competition and had caused the number of book dealers to multiply far beyond the requirements for satisfactory

¹ Kontradiktorische Verhandlungen, pp. 594-596.

² Ibid., pp. 262 et seq., 347.

³ Ibid., pp. 599 et seq. Bücher attempts statistical proof of the advance; also a pupil of his, Dr. Löserth, presents a statistical analysis and arrives at the same conclusion. Cf. Dr. Gerhard Löserth, *Zur Statistik der Bücherpreise*, Zeitschrift für die gesamte Staatswissenschaften, Jhg. lx, p. 358 (1904).

distribution.¹ Professor Bücher asserts that the publisher also is in part responsible for the higher prices — too many books published, and too few of each kind.

The friends of the book trade defended the business in numerous articles and pamphlets.² In connection with its kartell inquiry, the Imperial government finally in 1904 summoned representatives of the Börsenverein, the publishers, booksellers, the Schutzverein, and the librarians. In the course of the hearings the proposal was made and adopted to arbitrate the differences between the Börsenverein and the Schutzverein. The board selected for the task met in May, 1904, but the Schutzverein speedily broke off negotiations because the Börsenverein would not consent to large concessions.³ Libraries were favored somewhat when in 1907, the Börsenverein promised the Prussian Ministry of Education that it would grant discounts of 5 and 7½ per cent, the latter to large libraries. Thereupon, the Börsenverein declared the discount question definitely and finally settled.

III. ENGLISH EXPERIENCE

Turning to England, one finds that book trade associations are mentioned as having existed as early as 1802. But the first to arouse widespread interest was the new organization formed in 1850.⁴ Trade regulations were issued by the publishers in an endeavor to prevent the retail booksellers from granting a greater discount than 10 per cent to buyers. As in Germany and else-

¹ For statistics, see the various numbers of the official *Addressbuch*; also *Handwörterbuch der Staatswissenschaften*, article *Buchhandel*.

² *Kontradiktorische Verhandlungen*, pp. 605 et seq. See, for instance, Wissowa, in *Conrad's Jahrbücher*, vol. lxxxii (1905), pp. 218 et seq.; Bücher's reply, *ibid.*, pp. 546 et seq.; also current numbers of the *Allgemeine Buchhändlerzeitung* after March, 1904.

³ Liefmann, in article cited above, p. 201.

⁴ Macrosty, *The Trust Movement in British Industry*, pp. 277-278; Robert Bowes, *Booksellers' Associations, Past and Present* (Taunton, 1905); *Bookseller*, January 24, 1908, p. 17.

where, competition among book dealers had led to the introduction and gradual increase of the customers' discount. At that time, booksellers generally opposed the attempt of the publishers to enforce fixed prices. The universal disapproval of all who spoke or wrote led the publishers and booksellers to turn the matter over to three arbitrators for final decision. The board, consisting of Lord Chief Justice Campbell, Dean Milman, and George Grote, rendered a decision in favor of the booksellers in 1852. The opinion states that the alleged right of fixing resale price is contrary to the freedom of trade, and is not included in the property rights of the publisher. As a result of the decision, the association of publishers was dissolved.

Free from restraining influence, book dealers increased the customers' discount until 25 per cent became the ruling rate, with 40 per cent to libraries. At the same time, dealers complained bitterly; the sale of books at such discounts left little profit. The existence of the bookseller was threatened. In the half century after 1852 there was in fact a marked decrease in the number of dealers keeping high grade new books. In 1890, a number of London booksellers formed the "London Booksellers' Society" in an endeavor to find some remedy for the depression. However, since the association had no means of controlling its members, it could not increase the profits of the trade by means of maintaining prices. Nevertheless, it was through the initiative of this society, and with it as a nucleus, that the present general combination of booksellers, known as the "Associated Booksellers of Great Britain and Ireland," was organized in 1895.¹ The following year saw the formation of a general association of publishers.²

¹ Bowes, p. vi; Bookseller, January 24, 1908, pp. 17-18.

² Pub. Cir., vol. lxiii, pp. 594, 644.

Then the booksellers asked the publishers to coöperate in establishing and maintaining a net price system.¹ Publishers were reluctant; the association claimed that it was beyond the sphere of the organization, and referred the dealers to the individual publishers.² Before the next annual meeting, however, the pressure exerted by the booksellers had been so effective that the council of the publishers' association approached a committee of dealers with a proposition that the customers' discount be limited to two pence in the shilling, intimating that the publishers would enforce it by whatever coercive measures were necessary. The retailers were not only willing to agree to such restriction but advocated total abolition of the discount. To such a step the publishers' association would not agree without the approval of the Society of Authors. This body in turn investigated the matter and refused to approve the adoption of the net price system.³ The publishers accordingly declined to enter into the arrangement. The leaders in the movement did not, however, become disheartened; and finally the publishers assented to the demand of the retailers, proposing practically the net system.⁴ Both associations soon adopted it formally. According to this plan, which went into force on January first, 1900, certain books were to be chosen by the publishers and designated as "net books." Such books were not to be sold to the public at less than the full publisher's price. Any violation operated to prevent the bookseller from

¹ Fred. MacMillan, in a letter to the Bookseller, March, 1890, proposed the net system. Cf. also *Pub. Cir.*, vol. lxxxvi, p. 224. It may be of interest to state that when Messrs. MacMillan determined to try out the net system alone, since other publishers would not join them, they persuaded Professor Marshall to allow them to experiment with his *Principles of Economics* published in July, 1890.

² *Pub. Cir.*, vol. lxi, p. 99; *ibid.*, vol. lxvi, p. 374.

³ *Ibid.*, vol. lxvii, pp. 7, 8. The test of the society's letter to the publishers with the various arguments, is to be found in *Pub. Cir.*, vol. lxvii, p. 687.

⁴ Nearly every number of the Publishers' Circular contains some reference to the agitation for the net system.

securing the usual trade discounts upon his purchases, thus forcing him to pay full retail prices.¹

The adoption of the net system in England caused little organized opposition until the fall of 1905, when a London newspaper, the *Times*, conceived the idea of opening a loan library as an advertising scheme, membership to be free to its subscribers.² To the *Times* Book Club, as the arrangement was called, was added a bookselling establishment in which both new and second hand books, no longer needed in the loan library, were sold. These were advertised as "virtually as good as new" and offered at 35 per cent discount after one month's use, with larger discounts for books which had been longer in circulation. In securing its books, the *Times* had in common with all other booksellers agreed to the net system contract; and had at the same time secured five-year contracts with several publishers, as well as agreements in regard to advertising. The booksellers protested violently against this method of selling second hand books as a violation of the net agreement. The "book war" ensued between the *Times* on the one side and the booksellers and publishers on the other.³ The publishers decided to support the retailers; and all publishers except those bound by long term contracts refused to supply books to the *Times* at less than retail prices. The publishers also withdrew their advertising patronage from the paper. Thereupon the *Times*, alleging that it was fighting the people's battle against the monopolistic book trust, attempted to impose a boycott of its own by asking the public not to buy books issued by those publishers who refused to deal with it. The publishers and dealers as vigorously defended the net

¹ Bowes, p. vii; Macrosty, p. 278.

² Macrosty, pp. 276-279; Pub. Cir., vol. lxxxiv, p. 37; *ibid.*, vol. lxxxv, p. 5.

³ Macrosty, pp. 279 et seq.; the columns of the Publishers' Circular and of the *Times* during this period contain innumerable paragraphs and articles upon the book war in all its phases.

system;¹ the Society of Authors on this occasion passed a resolution in its favor;² and the best literary journals lent their support to the publishers' association.³ It became exceedingly difficult for the *Times* to secure books, so that various devious means were employed in order to keep the Club in operation.⁴ A report was even circulated that the *Times* intended to establish a publishing house of its own; but nothing came of it.⁵ After over two years of struggle, the book war came quietly to an end in 1908.⁶ The net system triumphed, altho certain changes had been made in the rules, especially with reference to the treatment of second hand books. As the agreement now stands,⁷ publishers will supply books to dealers at the usual trade discounts only upon condition that the bookseller agrees (a) not to sell any net books at less than the publishers' price; (b) not to offer second hand copies of a net book at a discount within six months of publication; and (c) not to treat as unsaleable or as dead stock, any copies within twelve months of purchase. Wholesale dealers must agree to allow the usual trade terms to retailers in good standing; and must agree not to sell any such net books at less than full net price to any customer who does not comply with the above conditions.

Since the trouble with the *Times*, the net system seems to have been working smoothly;⁸ the number and

¹ Pub. Cir., vol. lxxxv, pp. 308-309; also pp. 423, 452.

² Ibid., vol. lxxxv, p. 553.

³ A long list of references from the Athenaeum, Nation, Dial, etc., is to be found in the Reader's Guide. Cf. Pub. Cir., vol. lxxxv, pp. 633, 634, 789; also the pamphlet in favor of the publishers, reprinted from Truth of October 3, 1906, entitled "The Times, the Booksellers, the Public, and the Publishers."

⁴ London Times, January 20-30, 1907; Pub. Cir., vol. lxxxvi, pp. 77, 265.

⁵ Ibid., vol. lxxxvi, pp. 437; vol. lxxxvii, pp. 33, 203, 609.

⁶ Ibid., vol. lxxxix, p. 435.

⁷ Macrosty, p. 280. Current numbers of the Publishers' Circular contain in the advertising section a copy of the terms of sale issued by the publishers.

⁸ See, for instance, the report of the Council of the Publishers' Association, Pub. Cir., vol. xcii, p. 463; also see vol. xci, p. 955, and Pub. Wk., vol. lxxxv, p. 1292.

proportion of net books among the net books published has been gradually increasing, and it is the aim of the associations finally to extend the system to cover the entire trade.

IV. THE AMERICAN BOOK TRADE

The history of bookselling in the United States may be summed up in a few words, — comparative prosperity until the decade of the seventies, followed by depression ascribed to the gradual increase in the discounts granted to customers. Booksellers saw their profits decreased, not only by competition among themselves, but also by the rising competition of the department store, especially in the so-called staple books. They sought, consequently, to find a remedy for the situation in combination. But since the failure of the American Book Trade Association in 1876, after an existence of three years, little effort had been made along this line.¹ The exceptions were a few local organizations, of which the Virginia association was the most successful. The Booksellers' League of New York is another example.²

As the experience of England and Germany had demonstrated, local associations were unable to bring about any effective regulation of prices and discounts. The great need was centralized organization. The formation of the British booksellers' association in 1895 and the union of the publishers a little latter, undoubtedly exerted an influence upon the American book trade.³ Unlike the movement in England, however, the creation of a centralized organization was in

¹ Pub. Wk., vol. vii, p. 27; vol. vi, p. 159; vol. lxxxvi, p. 1434.

² The Booksellers' League, by A. G., pp. 7 et seq., 33 et seq., 54, 55; Pub. Wk., vol. lviii, pp. 253, 917.

³ Ibid., vol. lviii, p. 253.

the United States undertaken first by the publishers, who after much discussion formed the American Publishers' Association, eventually including a large majority of that branch of the book trade. The association it was declared, was "not a trust, or against any one class, author, department store, or the like, but an honest endeavor to make book prices honest and reasonable, and their sale reasonably profitable."¹ Strict maintenance of the publishers' price was the aim, but was not to be attained without the coöperation of the booksellers. Urged by the publishers, the American Booksellers' Association, including 90 per cent of the dealers both in number and volume of trade, was formed early in 1900.²

The plan finally adopted by the publishers' association and ratified by the union of booksellers went into effect in May, 1901.³ The articles of the combination of publishers stated the agreement of its members that all copyright books, other than fiction, school books, and such new editions as the individual publisher might wish to be exempted, should be published at net prices, — which it was recommended should be reduced from former prices. It was further agreed that such copyrighted books and all others of their volumes should be sold by them only to those booksellers who maintained the retail price, as fixed by the publishers, for one year, and to those booksellers and jobbers who would co-operate in maintaining book prices by refusing to sell to

¹ Pub. Wk., vol. lviii, p. 287; vol. lxxvi, pp. 1434 et seq. Also *Bobbs-Merrill Co. v. Straus*, 139 Fed. 155, reprinted in *Federal Anti-Trust Decisions* (hereafter abbreviated F.A.T.D.), vol. ii, p. 755, 759.

² Pub. Wk., vol. lviii, p. 917; vol. lix, p. 487; F.A.T.D., vol. ii, p. 761.

³ *Ibid.*, vol. ii, p. 759, Exhibit A; Pub. Wk., vol. lix, pp. 525-526. The American Booksellers' Association at its first annual convention in 1901, adopted a resolution endorsing the action of the publishers' association and urging the extension of the net system to all books including fiction. *Ibid.*, vol. lix, p. 893; F.A.T.D., vol. ii, pp. 761-762, Exhibit B.

those known to cut prices, or to violate the rules established in certain cases by local associations. The only exception allowed was in the case of libraries, to which a discount was permitted. These rules were not binding for more than one year after purchase; but the publisher reserved the right to buy back any lot of books upon which the retailer might intend to cut the price. It was the duty of members to report all cases of cutting to the central office. During 1902 and 1903, some changes were made in the sales regulations; the maximum discount on fiction, for example, was fixed at 28 per cent, violation of which was to be treated as a violation of the net agreement.¹

Librarians were in general not in sympathy with the net system; since with their limited funds, each increase in book prices meant a reduction in the number of books purchased.² The protests of the individual book buyer received little publicity. But the only serious opposition to the enforcement of the net system came from a New York department store, Macy's, owned by Straus and Straus. Contrary to regulations, Macy's proceeded to cut the prices of net books. The associations then applied the boycott provided for such cases; so that it was only by buying in small lots at great expense, through agents stationed in various cities of the United States, that this department store could secure books to supply its customers. In 1903 Macy's took the matter to the courts, beginning a period of litigation which was not ended until a decade later. In the series of cases before the New York and Federal courts, one or both of two distinct questions have been up for settlement. The first concerned the right of the owner of a copyright

¹ The articles as amended are reprinted in F.A.T.D., vol. ii, pp. 762 et seq., Exhibits C, D, and E.

² Opinion of the American Library Association, Pub. Wk., vol. lxxix, p. 1103.

to fix resale price; the other the legality of combinations for maintaining prices fixed by individual publishers.

As a first step, Macy's applied for an injunction to restrain the American Publishers' Association from carrying out its boycott on the ground that the combination was unlawful and in restraint of trade. The association replied that each publisher was free to fix his own prices; further that combination was resorted to in order to remedy the recognized disorganization in the book trade, which Macy's now wished to renew. The injunction was refused, no violation of the Donnelly Act (the New York anti-trust act) being discovered. The case was then carried to the higher New York courts. The Appellate Division of the Supreme Court reversed the earlier decision by declaring that copyright gave no power to control prices after the first transaction had been completed. The American Publishers' Association carried the case to the highest state court, the Court of Appeals, which rendered a decision adverse to the publishers. This last decision did not involve the question relating to copyrights, but asserted that the attempt to prevent Macy's from procuring uncopyrighted books was a restraint of trade and contrary to the Donnelly Act.¹

Thereupon, both the publishers' and booksellers' associations proceeded to amend their rules by dropping the phrase "and all other books" in the boycott provision, thus making the rules applicable only to copyright books. The American Publishers' Association was allowed to amend its pleadings to conform to the change in its rules.² The former decision was then upheld as far as it applied to uncopyrighted books and the matter was

¹ 177 N.Y. 473 (85 App. Div. 446). Portions of the opinion are quoted with approval in F.A.T.D., vol. ii, p. 771; see also Harvard Law Review, vol. xix, 123.

² Pub. Wk., vol. lxx, 761; F.A.T.D., vol. ii, p. 776.

turned over to a referee to estimate damages suffered by Macy's from interference with uncopyrighted books. But the firm was defeated in its attempt to secure damages for copyright books, both in the Appellate Division of the Supreme Court, and in the Court of Appeals.¹

Meanwhile, Macy's became involved in proceedings in the Federal courts. The Bobbs-Merrill Co. brought suit against the department store asserting that under-selling was an infringement of the copyright.² A decision in favor of Macy's was rendered by the United States Court of Appeals, affirming that the owner of a copyright had no power to fix resale price. It also held that the American Publishers' Association was a combination in restraint of trade. None too sure of its legality, this association had already in 1907 repealed all its rules and had adopted resolutions changing the former agreement into a "recommendation," trusting to the honor of its members for its execution.³ The Macy firm, little satisfied with the decisions of the New York courts in 1909, carried its case over into the Federal courts, — bringing suit for \$375,000 damages suffered through interference with copyright books. Finally reaching the Supreme Court of the United States, a decision was rendered in December, 1913, in which the American Publishers' Association was declared to be a combination in restraint of trade, within the prohibition of the Sherman Act.⁴ It was reaffirmed that in this case copyright did not give the owner the power to fix resale

¹ Pub. Wk., vol. lxxvi, p. 90; vol. lxxviii, p. 1397.

² Bobbs-Merrill Co. v. Straus, 139 Fed. Rep. 155, reprinted in Federal Anti-Trust Decisions, vol. ii, pp. 755 et seq.

³ 231 U.S. 222 (1913).

⁴ 231 U.S. 222 (1913); Pub. Wk., vol. lxxxiv, pp. 1933-1937, 2151; Harvard Law Review, vol. xxvii, p. 293. The briefs in the case are reprinted in Pub. Wk., vol. lxxxiii, pp. 948-971. The association finally arrived at an agreement with Macy's whereby the former was to pay the latter \$140,000 damages. Ibid., vol. lxxxvi, p. 7.

price.¹ As a consequence of its failure to secure legal recognition, for the principle for which it had primarily been organized, either by the courts or by statutory enactment, the American Publishers' Association voted to dissolve in the fall of 1914, tho still stoutly maintaining that the association never was a trust.²

V. SUMMARY AND CONCLUSION

The foregoing comparison of the book trade associations of the three countries discloses a remarkable similarity. In each instance, disorganization and depression in the retail book trade, due in part to the introduction and increase of the discount given to customers, led to combination as a means of remedying the situation. In Germany and England, the publishers were at first unwilling to coöperate when urged by the booksellers to assist in maintaining prices; in America, the publishers took the initiative. In each country, maintenance of the publishers' price was the aim; and in each the means of attainment was the same, — the boycott, refusal to treat the offender as other than a retail buyer. It appears that only in America has the copyright been utilized to enforce fixed prices. The

¹ A later case in which the Macy firm was sued for damages by a talking machine concern for price cutting has been decided in the same way. *Victor Talking Machine Co. v. Straus*. Pub. Wk., vol. lxxxvii, p. 968 (March, 1915). A recent decision by the Supreme Court of the state of Washington, relating to the sale of flour at less than the resale price fixed by the manufacturer, has been decided in favor of the fixed price policy. *Fisher Flouring Mills Co. v. Swanson*, *ibid.*, vol. lxxxv, pp. 507 et seq. The case is free from complications since it involved no monopoly, no question of trademark rights, and the decision was made to rest solely upon the question of public policy.

² Since the decision, the publishers have worked more energetically to bring about a legalization of the fixed price system through special enactments amendatory to the Sherman Act. The Stevens and Metz bills favoring price maintenance have been favored generally by the publishing trade. The advocates of the principle hoped to incorporate a provision in the recent anti-trust act dealing with the fixed price system, but were not successful. *Ibid.* vol. lxxxv, p. 1144. The hearings and net price debate in Congress during the discussion of the anti-trust bill are reported, *ibid.*, pp. 1145, 1147. Cf. also *ibid.*, vol. lxxxv, pp. 664; vol. lxxxvii, p. 663. Dissolution of association, vol. lxxxvi, pp. 1433, 1434.

book trade combinations have everywhere met organized opposition, but only in the United States were they unsuccessful in the struggle. Germany and England now accept price maintenance as legal and proper; but in this country associations established for this purpose have been declared illegal, and the whole question is now up for acceptance or rejection by the public.¹

The argument against the uniform price system in the book trade rests mainly upon the assertion that the more efficient distributors should be allowed to give the public the benefit of lower costs of handling a product. It is claimed that any system of uniform net prices will unavoidably work injustice upon consumers, because they are deprived of the benefits of location and other factors which might tend to lower the price. Much is also made of the legal right of the owners of property to dispose of it at such prices as he sees fit.¹ Finally, under the fixed price system, there is constantly the danger that the prices will be too high, thus detrimental to the public.

The arguments in favor of the net system in the book trade are numerous. It is asserted that the maintenance of prices is of advantage to the bookseller, first because it insures him the benefit of any trade value he may have acquired; secondly, it insures him at least a reasonable profit; further, the big dealer is not given an undue advantage; and finally, he is free from the competition of those stores which cut prices for advertising purposes. The net system appeals to the publisher because it assures him a system of distributing agents,

¹ For a general discussion of the problem of price maintenance, see T. A. Fernley, *Price Maintenance* (1913); Cherington, *Advertising as a Business Force*, pp. 380-428. Numerous references are to be found in the trade periodicals, *Printers' Ink* and *Publishers' Weekly*, especially during the past three years. Cf. among others, *Pub. Wk.*, vol. lxxxv, pp. 193, 507 et seq., 664, 1144; vol. lxxxvi, pp. 1967, 347; vol. lxxxvii, pp. 663, 434, 968, 1008, 1264. Also the article by Mr. E. S. Rogers, "Predatory Price Cutting as Unfair Trade," *Harvard Law Review*, vol. xxvii, p. 139.

and protects him from the harm which may result when the publisher's price is not observed by retail booksellers. It is conceivable, and even probable, that the ruthless underselling of the books of a given publisher might have the result of turning other booksellers away from the firm, thereby actually decreasing his sales. Viewed in this light, price cutting may become unfair trade, because the publisher is deprived of a certain amount of patronage to which he is entitled; also because a firm by cutting prices is apt to give the impression among buyers of that article that the price fixed was too high, thus destroying a certain amount of value, good will, reputation, or whatever else one may choose to term that intangible quantity.

The consumer, it is said, is benefited by price maintenance because all buyers are treated absolutely alike; no one class of purchasers is favored at the expense of another. The net system enables the local bookstore to continue in business, — a great educative force in the community. But to the consumer the vital question is, how will price maintenance affect book prices, not only immediately, but permanently? The ultimate adoption or rejection of the principle of price maintenance depends upon the answer to this question. If the prices are reasonable, the public is benefited; if unreasonably high, the public is deprived of the leveling influence of competition, and in the end would pay more for its books than under competitive conditions. Theoretically, the elimination of some of the wastes of competition ought to enable the book trade to maintain prices at a level somewhat below that which would prevail under unrestrained competition. The discussion is endless; for it involves the questions of normal price, of normal profit, and of the best mode of distribution. As yet, one is safe only in the assertion that if

the price level selected and maintained is the proper one, the policy of price maintenance possesses decided advantages for publisher, dealer, and book buyer; if the level is too high, the consumer suffers; if too low, either the dealer or publisher, or both; eventually, also the consumer.

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